SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

J. L. HOWARD, *alias* FRANK THOMPSON; A. L. DALY, *alias* GONEZ BONO, and H. D. HAWLEY, APPELLANTS,

versus

CAPTAIN J. M. FLEMING, WARDEN OF THE STATE'S PRISON OF NORTH CAROLINA.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

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APPELLANTS' ASSIGNMENT OF ERROR.

The appellants' assignment of error (Record, pages 51 and 53) are, briefly, as follows:

1. That the grand jury which presented the bill of indictment against them was illegally drawn.

2. That they were denied the equal protection of the laws of North Carolina by being tried on that bill of indictment.

3. That the trial court did not instruct the jury that the law presumed the petitioners to be innocent until overcome by positive evidence of guilt.

4. That the judgment was illegal, because

(a) It was more severe than usual.

(b) It was unauthorized by statute.

(c) It was cruel and unusual, as defined by the Constitution of North Carolina.'

(d) It violated the Eighth Amendment to the Federal Constitution.

5. For that a conspiracy to cheat and defraud is not a criminal offense in North Carolina.

6 and 7. These are merely formal.

CAN THIS PROCEEDING BE MAINTAINED?

It is a general rule that after a conviction in a State Court, as in the case here, the validity of the proceeding will not be enquired into in habeas corpus proceedings, except in cases of peculiar urgency. That the proper and usual remedy is by writ of error.

In the case of *Whitten v. Tomlinson*, 160 U. S., 238, Mr. Justice Gray points out that there are three methods by which the jurisdiction of the State Courts may be controlled in so far as is necessary to secure the supremacy of the Constitution, laws and treaties of the United States—by writs of error, by removal and writs of *habeas corpus*. It is declared that the Courts of the United States possess the power to enquire if prisoners are held under the authority of a statute in violation of the Constitution, laws or treaties of the United States under

writs of *habeas corpus*, but that they are not obliged to do so and will not do so except in peculiar and urgent cases—that is, cases which affect the Federal Government, the administration of its laws and the like. That in other cases the petitioner will be left to his remedy by writ of error. He declared: "But, except in such peculiar and urgent cases, the Courts of the United States will not discharge the prisoner by *habeas corpus* in advance of a final determination of his case in the Courts of the State; and, even after such final determination in those courts, will generally leave the petitioner to the usual and orderly course of proceeding by writ of error from this Court. *Ex parte Royall*, 117 U. S., 241; *Ex parte Fonda*, 117 U. S., 516; *Duncan v. McCall*, 139 U. S., 449; *Wood v. Brush*, 140 U. S., 278; *Jugiro v. Brush*, 140 U. S., 291; *Cook v. Hart*, 146 U. S., 183; *Ex parte Frederich*, 149 U. S., 70; *New York v. Eno*, 155 U. S., 89; *Pepke v. Cronan*, 155 U. S., 100; *Bergemamm v. Backer*, 157 U. S., 655."

In the case of *In re Grice*, 79 Fed. Rep., 635, Judge Swayne, after citing a number of authorities, declared that the cases of urgency mentioned in *Whitten v. Tomlinson* did not include all of the urgency cases, and proceeded to pass upon the constitutionality of the Texas "Anti-trust Act," and discharged the prisoner upon the ground that this act was unconstitutional.

But in *Baker v. Grice*, 169 U. S., 284, the Supreme Court of the United States reversed Judge Swayne and declared that the question ought not to have been decided by him upon a writ of *habeas corpus*. After restating the rule, Mr. Justice Peckham, for the Court, said: "The reason for this course is apparent. It is an exceedingly delicate jurisdiction given to the Federal Courts by which a person under an indictment in a State Court and subject to its laws may, by the decision of a single Judge of the Federal Court upon a writ of *habeas corpus*, be taken out of the custody of the officers of the State and finally discharged therefrom, and thus a trial by the State Courts of an indictment found under the laws of a State be finally prevented. Cases have occurred of so exceptional a nature that this course has been pursued. Such are the cases *In re Loney*, 134 U. S., 372, and *In re Neagle*, 135 U. S., 1, but the reasons

for the interference of the Federal Courts in each of these cases were extraordinary and presented what this Court regarded as such exceptional facts as to justify the interference of the Federal tribunal."

In the case of *Boske v. Commingore,* 177 U. S., 460, is found a recent instance of a case of urgency, in that the petitioner was an officer in the revenue service of the United States, whose presence at his post of duty was important to the public interests.

It may be suggested that Grice's case was a petition for *habeas corpus* before conviction. The case of *Markuson v. Boucher,* 175 U. S., 184, is one of the last and most conclusive utterances of the Court. In that case, after conviction, petitioner was sentenced to one year in a penitentiary under an alleged unconstitutional statute. It was urged for petitioner that he was in "straitened circumstances and without means or power to prosecute a writ of error from the Supreme Court of the State to the Supreme Court of the United States or to employ counsel to present or argue it there, and is informed and believes if he had such means it could not be brought on for hearing before the expiration of his sentence."

The Court, speaking through Mr. Justice McKenna in that case, said, after quoting from *Baker v. Grice, supra:* "The jurisiction is more delicate, the reason against its exercise stronger, when a single judge is invoked to reverse the decision of the highest court of a State in which the constitutional rights of a prisoner could have been claimed and may be were rightly decided, or, if not rightly decided, could be reviewed and redressed by a writ of error from this Court.

"The case at bar presents no circumstances to justify a departure from the rule or to relieve from the application of its reasons."

This doctrine has been again stated by Mr. Justice Brown in the case of *Davis v. Burke,* 179 U. S., 399. See also *Minnesota v. Brundage,* 180 U. S., 499.

The last decision to which we have access is *Reid v. Jones,* ... U. S., ..., where Mr. Justice Harlan declared for the Court: "The merits of this case have been fully considered in

case No. 269 (*Reid v. Colorado*, 187 U. S., ..., *post*, 92, 23 Sup. Ct. Rep., 92). But if this had not been, we should dismiss the present appeal; for one convicted in a State Court for an alleged violation of the criminal statutes of the State, and who contends that he is held in violation of the Constitution of the United States, must ordinarily first take his case to the highest court of the State in which the judgment could be reviewed, and thence bring it, if unsuccessful there, to this Court by writ of error; that only in certain exceptional cases, of which the present is not one, will a Circuit Court of the United States, or this Court upon appeal from a Circuit Court, intervene by writ of *habeas corpus* in advance of the final action by the highest court of the State. *Ex parte Royall*, 117 U. S., 241, 251; *New York v. Eno*, 155 U. S., 89; *Minnesota v. Brundage*, 180 U. S., 499, 502, and authorities cited."

FIRST ASSIGNMENT OF ERROR.

The appellants contend that they should have been discharged on the writ of *habeas corpus* because of informalities in the manner in which the jury was drawn for the court at which the bill of indictment was found and they tried and convicted. It will be observed that while a motion was made to quash the bill of indictment (Record, page 62), this objection was not made, and was first heard of in the replication of the petitioners to the answer of the Warden of the State Penitentiary to the writ of *habeas corpus* (Record, page 24), where the facts are stated constituting the alleged illegal method of drawing the grand jury.

These alleged irregularities cannot avail the appellants, for two reasons:

THE OBJECTION SHOULD HAVE BEEN TAKEN BEFORE PLEA TO THE INDICTMENT.

"The settled rule of a State Court that objections to the manner of selecting grand jurors on behalf of one who has been indicted by such jurors must be taken by plea in abatement, and not by motion to quash the venire and panel, is binding on

the Supreme Court of the United States on writ of error to the State Court." Torrence v. Florida, U. S. (October Term, 1902).

It is the settled rule in North Carolina that exceptions to the constitution and qualification of the grand jury must be taken before plea, or they will be declared to have been waived.

The rule is thus stated in *State v. Gardner,* 104 N. C., 739: "If the motion is made before plea, the defendant has the right in law to have the qualification or constitution of the grand jury inquired into and passed upon; but if made after plea and before the jury is empaneled, it may be granted or not, in the sound discretion of the presiding judge, but if it is not made until after the jury is sworn, the objection will be deemed to have been waived."

This case has since been approved in the following cases:

State v. Wilcox, 104 N. C., 853.
State v. Sharp, 110 N. C., 604.
State v. Fertilizer Company, 111 N. C., 658.
State v. DeGraff, 113 N. C., 688.

Avery, J., thus states the rule in Sharp's case: "The general rule is that such a plea will not be sustained, if admitted to be true, unless it show a want of some positive qualification prescribed by law; that all other objections to the competency of a grand juror must be taken, if at all, by challenge, and will not be heard after the time for challenging is passed. Thom. & Mer. on Juries, section 533; Bishop Cr. Prac., section 739; *People v. Jarrett,* 3 Wend., 314; 12 Am. & Eng. Enc., 343*a*."

The last time the question was presented to the North Carolina Supreme Court was in *State v. Parker,* 43 Southeastern Reporter, 830 (not yet officially reported), in which the Court declares:

"A special venire of twenty-five freeholders was summoned under the order of the Court, whose names were drawn from the jury box, in the presence and under the direction of the Court, by a boy who was over ten years of age, and five of the jurors so drawn were taken and served upon the jury. There does not appear to have been any challenge or objection to any

of them. So far as it does appear, they were each and all perfectly acceptable to the State and defendant. After the verdict of guilty had been returned by the jury, the defendant, through his counsel, moved in arrest of judgment upon the ground that the special venire had been drawn by a boy over ten years of age, and that five of the venire had served as jurors in the case. The motion of the defendant to arrest the judgment was properly overruled. It was too late after the verdict to present any objection to the manner of selecting the jurors for the special venire by a motion in arrest of judgment."

But the matter is settled by statute, for the Legislature in 1883 put into statutory form what had previously been the acknowledged practice in this State. The following is section 1741 of The Code:

"All exceptions to grand jurors for and on account of their disqualification shall be taken before the jury is sworn and empaneled to try the issue by motion to quash the bill of indictment, and if not so taken, the same shall be deemed to have been waived."

THE FEDERAL COURTS ADMINISTER THE SAME RULE.

The petitioners will hardly seriously contend that this statute is in contravention of the Federal Constitution, for the Federal practice is uniform with the State procedure and the State statute, for it was held, in *United States v. Gale*, 109 U. S., 65 (27: 857), that a plea to an indictment is a waiver of the mode of selecting a grand jury, even though the objection is upon the ground that the act under which the grand jury was drawn and selected is unconstitutional, *i. e.*, that it violates the provisions of the Federal Constitution.

Again, in *Agnew v. United States*, 165 U. S., 36 (41: 624), it was held that "a plea in abatement of an indictment stating that the drawing of the grand jurors tended to the defendant's injury and prejudice, without stating any grounds for such conclusion, is fatally defective"; and that "an objection to irregularities in drawing grand jurors is too late when it is made in a plea of abatement filed five days after indictment and

two weeks after the irregularities complained of began, when no reason is given for failure to make the objection sooner."

Again, in *Andrews v. Swartz,* 156 U. S., 272, petitioner alleged that he was deprived of his constitutional protection, in that in making up the grand jury which indicted him and the petit jury which tried him the sheriff had purposely excluded therefrom negroes—petitioner being a negro—and he offered to show this to the Court, which refused to hear it. The Court held that this does not entitle him to *habeas corpus;* that if it were so, the State Court had not thereby lost jurisdiction of the offense or of the accused.

THE STATUTE IS MERELY DIRECTORY.

But even if the appellants had in apt time objected to the alleged irregularities in the method of drawing the grand jury, it would not have availed them, for the Supreme Court of North Carolina holds that the provisions regulating the drawing of grand juries are not mandatory, but are merely directory.

"It has always been held that the regulation of The Code, sections 1722 and 1728, are directory only to the Board of County Commissioners, and, while they should be observed, a failure to do so does not vitiate the venire in the absence of bad faith or corruption on the part of the County Commissioners." Quotation from *State v. Perry* (Hatton), 122 N. C. R., 1020.

The opinion quotes as authority for this statement the following cases:

State v. Smarr, 121 N. C. R., 669.
State v. Stanton, 118 N. C. R., 1182.
State v. Fertilizer Company, 111 N. C., 658.
State v. Wilcox, 104 N. C., 847.
State v. Hensley, 94 N. C., 1021.
State v. Martin, 82 N. C., 672.
State v. Griffice, 74 N. C., 316.
State v. Haywood, 73 N. C., 437.

See also *State v. Potts,* 100 N. C., 460, where it appeared

that there was but one key, and boxes were improperly labelled. Chief Justice Smith said: "The ruling is correct, and the deviation from a direction merely of the act is not a material matter, as its esssential provisions for the security of the accused have been observed."

State v. Martin, 82 N. C., 672, is strikingly in point with the case at bar. There, upon a motion to quash in apt time, it appeared that the County Commissioners, after drawing certain jurors, put their names back into the box and drew others so as to secure an equality of jurors from the different townships in the county. It was held that while not in strict compliance with The Code, the act being merely directory and not mandatory, and no actual wrong had been done or intended, the challenge to the array was overruled.

In our case the names from each township were put into smaller boxes inside of the boxes prescribed by law, and certain numbers were drawn from each of the smaller boxes to secure equality among the several townships, and it does not appear that any wrong was done or intended to the petitioners. The case is clearly within the rule stated in Martin's case.

SECOND ASSIGNMENT OF ERROR.

The second assignment of error (Record, page 53) is that the Supreme Court of North Carolina did not find as a fact and hold as its judgment that the appellants were denied the equal protection of the laws of the State of North Carolina in accepting and filing the bill of indictment on which they were tried.

It is presumed that this is a mere repetition of the first assignment of error, which has already been answered. This assignment specially objects to the finding of facts by the State Courts. These cannot be reviewed either upon appeal or writ of error.

Dower v. Richards, 151 U. S., 663, 668, 669.
In re Buchanan, 158 U. S., 31.
Bartlett v. Lockwood, 160 U. S., 360.
Stanley v. Schwalby, 162 U. S., 278.
Noble v. Mitchell, 164 U. S., 373.
Israel v. Arthur, 152 U. S., 362.

It is for the State Court to determine whether or not its statutes are binding under the State Constitution, and whether one has received equal protection of the laws of the State in a regular administration of the criminal law. *Leeper v. Texas*, 139 U. S., 462; *O'Neil v. Vermont*, 144 U. S., 336.

INSUFFICIENCY OF INDICTMENT NOT A FEDERAL QUESTION.

An erroneous ruling on a defective indictment does not present a Federal question.

Bergemann v. Backer, 157 U. S., 655.
Central Land Company v. Laidley, 159 U. S., 112.
Gibson v. Mississippi, 162 U. S., 59.
In re Boardmen, 169 U. S., 44.
Remington Paper Company v. Watson, 173 U. S., 451.
Kohl v. Lehlback, 160 U. S., 293.

Due process of law does not even require an indictment where information is provided for.

McNulty v. California, 149 U. S., 645.
Talton v. Mayes, 163 U. S., 384.
Nordstron v. Washington, 164 U. S., 705.

The question as to whether or not an indictment charges a crime under the laws of a State does not present a Federal question.

Caldwell v. Texas, 137 U. S., 692.
Davis v. Texas, 139 U. S., 652.
Bergemann v. Backer, 157 U. S., 656.
O'Neil v. Vermont, 144 U. S., 323.

THIRD ASSIGNMENT OF ERROR.

The third assignment of error (Record, page 53) is that the appellants were denied equal protection of the laws of North Carolina, in that the *nisi prius* judge did not instruct the jury that they were presumed to be innocent, and that this presumption attended them until it was overcome by positive evidence of guilt.

The answer to this assignment of error is that it is untrue in fact. While the judge did not charge the jury in the very language asked, he impressed upon the jury four different times not only that there was a presumption of innocence, but that this presumption should not only be rebutted by the facts proved, but that they should satisfy the jury *beyond reasonable doubt.*

The material part of the judge's charge on this subject is as follows (Record, pages 118 and 119):

"Where the State asks a conviction of any one charged with the commission of crime, it must satisfy the jury from the evidence in the case of the guilt of the accused *beyond a reasonable doubt*, and if it fails to do so, the jury should acquit, but if the evidence so satisfies, then the jury should convict. This rule of law applies to the case at bar, and if upon consideration of the evidence offered by the State, it satisfies you of the guilt of the defendants, or any two of them, *beyond a reasonable doubt,* then your verdict should be 'guilty' as to such, naming them; otherwise, if you are not so satisfied, that is to say, your verdict should be 'not guilty.'

"Now, what is a reasonable doubt? While there is no set formula that is used defining it, it may be defined for the purpose of this charge as being such a doubt as would appeal to and be supported by the reasoning of a man of ordinary intelligence, or, as has perhaps been more aptly expressed by our Supreme Court, as meaning that after a consideration of all the evidence with all the light derived from the argument of counsel and the instructions of the Court, the jury ought not to convict unless they find that their minds have been involuntarily led to the conviction that the prisoner was 'guilty,' as charged.

"Now, upon the consideration of the evidence, the argument of counsel and the charge of the Court in this case, say whether or not you are satisfied *beyond reasonable doubt* of the guilt of the defendants or any two of them, and if so, your verdict as to such should be guilty, naming them; otherwise, if not so satisfied, that is, 'not guilty' as to any or all of the defendants, as you may find. * * *

* * * "Take all the facts and circumstances disclosed by the evidence, and if they satisfy you *beyond a reasonable doubt*

of the existence of the conspiracy charged against the defendants or any two of them, then the act of any one of them is the act of all and each of the conspirators."

But even if this were error, no Federal question is presented by it.

FOURTH ASSIGNMENT OF ERROR.

This assignment of error alleges that the judgment and sentence imposed upon the defendants is void for four reasons:

(a) The first reason assigned is that in fact the sentence is more severe than that which has ever before been imposed.

There is no fact found in the record to support this contention, and a Federal question cannot be thus presented. *Walker v. Vellaraso*, 6 Wall., 128; *Dower v. Richards*, 151 U. S., 663.

(b) It is next contended that the sentence was unauthorized by the statutes of North Carolina. By the Public Laws of 1891, chapter 205, it was enacted as follows:

"A felony is a crime which is or may be punishable by either death or imprisonment in the State's Prison. Any other crime is a misdemeanor."

By section 1097 of The Code of North Carolina (1883) it is enacted that—

"Offenses made misdemeanors by statute, where a specific punishment is not prescribed, shall be punished as misdemeanors at common law; but if the offense be infamous or done in secrecy and malice or with deceit and intent to defraud, the offender shall be punished by imprisonment in the county jail or penitentiary not less than four months nor more than ten years, and be fined."

The Supreme Court of North Carolina, in the case of *State v. Mallett*, 125 N. C., 718, which was an indictment for a conspiracy to cheat and defraud, decided that under these two statutes one convicted of a conspiracy to defraud could be punished by imprisonment in the State Prison or Penitentiary for a period not exceeding ten years. Mallett's case was taken by writ of error to the Supreme Court of the United States. But this point was not even presented there.

The Supreme Court of North Carolina, in its opinion in the case at bar, says: "The defendants except to the sentence imposed of imprisonment in the penitentiary, but concede that this Court has ruled otherwise in *State v. Mallett,* 125 N. C., 718, which we reaffirm."

This is simply a case of a State Court determining the meaning of a State statute and Constitution, and contains nothing that is obviously violative of the fundamental principles.

Leeper v. Texas, 139 U. S., 462.
O'Neil v. Vermont, 144 U. S., 336.
McNulty v. California, 149 U. S., 645.
Lambert v. Barrett, 157 U. S., 697.
Raezel v. Kirk, 172 U. S., 646.
Bergemann v. Backer, 157 U. S., 655.
Kohl v. Lehlback, 160 U. S., 296.

(c) It is further contended that the judgment is void because the punishment is cruel and unusual as defined by the Constitution of North Carolina.

It was expressly held in *O'Neil v. Vermont,* 144 U. S., 323, that the question as to whether or not the punishment of a criminal is cruel or unusual under the Constitution and laws of a State is not a Federal one.

(d) It is further contended that the punishment is violative of the Eighth Amendment of the Federal Constitution.

The Eighth Amendment is inapplicable to the States, and applies only to Federal action.

O'Neil v. Vermont, 144 U. S., 323.
Barron v. Baltimore, 7 Pet., 243.
Pervear v. Massachusetts, 5 Wall., 475.
Ex parte Kemmler, 136 U. S., 436.
Davis v. Texas, 139 U. S., 651.

FIFTH ASSIGNMENT OF ERROR.

The fifth assignment of error is that a conspiracy to cheat and defraud is not a criminal offense in North Carolina.

Decision of State Court as to Existence of Law Conclusive.

The petitioners contend that there is no statute or provision of the common law which makes their conduct indictable in North Carolina, and that there being no criminal offense, they are held without due process of law.

It is not contended that if such a law exists it contravenes any provision of the Federal Constitution. The Legislature clearly has the right to pass such a law. The only question is, does such a law exist?

In the case of *Duncan v. McCall*, 139 U. S., 449, the petitioner contended that there was no act in the State of Texas making the offense of which he was charged indictable, and that for that reason "he was deprived of his liberty without due process of law and denied the equal protection of the laws." He contended that the statute was void because it had not been enacted in accordance with the requirements of the Constitution of Texas.

The following is the head-note of the decision:

"2. The decision of the State Courts on the question as to what are the laws of a State is binding upon those of the United States."

"3. Whether certain statutes of a State have or have not binding force, it is for the State to determine, and that determination in itself involves no infraction of the Constitution of the United States and raises no Federal question giving the Courts of the United States jurisdiction."

In the case of *Leeper v. Texas*, 139 U. S., 462, Mr. Chief Justice Fuller, in speaking for the Court, said:

"It must be regarded as settled that a petition for a writ of error forms no part of the record upon which action here is taken. * * *

"That whether statutes of a Legislature of a State have been

duly enacted in accordance with the requirements of the Constitution of such State is not a Federal question, and the decision of State Courts as to what are the laws of the State is binding upon the Courts of the United States. *South Ottawa v. Perkins*, 94 U. S., 260, 268 (24: 154, 157); *Post v. Kendall County Sup'rs*, 105 U. S., 667 (26: 1204); *Norton v. Shelby County*, 118 U. S., 425, 440 (30: 178, 185); *Atlantic & G. R. Co. v. Georgia*, 98 U. S., 359, 366 (25: 185, 188); *Baldwin v. Kansas*, 129 U. S., 52, 57 (32: 640, 642). That by the Fourteenth Amendment the powers of States in dealing with crime within their borders are not limited, except that no State can deprive particular persons or classes of persons of equal and impartial justice under the law; that law in its regular course of administration through courts of justice is due process, and when secured by the law of the State the constitutional requirement is satisfied."

The Supreme Court of North Carolina, in *State v. Brady*, 107 N. C., 822, decided that an indictment of the same character as that upon which petitioners were tried and convicted was good, and charged an offense against the criminal laws of North Carolina, citing other North Carolina authorities to sustain the position of the Court. Brady's case has been subsequently cited with approval nine times. As early as December Term, 1827, the Supreme Court of North Carolina had declared conspiracy to cheat and defraud to be a crime in this State. *State v. Younger*, 12 N. C. R., 357.

In the case of *Caldwell v. Texas*, 137 U. S., 691, the writ of error had been granted to the Court of Appeals of Texas upon the ground "that the indictment is fatally and fundamentally defective and void under the Constitution of the State and does not, either in form or substance, set out a valid charge of murder or any other offense known to the criminal law of the State, and is not due process of law under the Fourteenth Amendment of the Constitution of the United States." The writ of error was dismissed, on motion. Mr. Chief Justice Fuller, delivering the opinion, said:

"By the Fourteenth Amendment the powers of the States in dealing with crime within their borders are not limited, but no

State can deprive particular persons or classes of persons of equal and impartial justice under the law. Law, in its regular course of administration through courts of justice, is due process, and when secured by the law of the State, the constitutional requirement is satisfied. 2 Kent. Com., 13. And due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice. *Bank v. Oakley*, 17 U. S., 244. The powers of the State must be exercised within the limits of those principles, and its exertion cannot be sustained when special, partial and arbitrary. *Hurtado v. California*, 110 U. S., 516. No question of repugnancy to the Federal Constitution can be fairly said to arise when the enquiry of the State Courts is directed to the sufficiency of an indictment in the ordinary administration of the criminal law, and the statutes authorizing the form of indictment pursued are not obviously violative of the fundamental principles above adverted to." * * *

See also authorities cited under second assignment of error.

OTHER QUESTIONS.

The appellants present several other objections, either in their petition for a writ of *habeas corpus* and writ of error, or in their brief.

One relates to the question of whether they should be imprisoned in the penitentiary, or sentenced to work on the highways of Guilford county. This question was first presented in the rejoinder to the answer to the writ of *habeas corpus*.

The statute in direct terms gives the Judge discretion as to the place of imprisonment.

In the case of *Davis v. Burke*, 179 U. S., 404, it was decided that the place of execution did not present a Federal question.

The validity of a sentence under a State law will not be reviewed by the Supreme Court. *Storti v. Massachusetts*, 183 U. S., 142.

The appellants object that there was a misjoiner in the original bill of indictment which contained three counts. At the

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close of the evidence, two of them were *nol prossed* and used as bills of particulars upon the first count.

It was held that a Federal question was not presented by the suggestion of a misjoinder of counts in the indictment in the case of *McDonald v. Massachusetts*, 180 U. S., 313.

The instruction that the jury might find the defendant guilty if satisfied that he had killed and murdered, "in the manner and form charged in either of the counts," though one was bad, does not violate the Constitution of the United States so as to give jurisdiction to the Supreme Court. *Brooks v. Missouri*, 124 U. S., 396.

The appellants further contend that the Judge in imposing the sentence increased the term to imprisonment because of facts pertaining to the previous history of the defendants which he himself heard.

It was held in *State v. Wilson*, 121 N. C., 654, that in a charge for conspiracy to seduce a woman the previous character of the defendant ought justly and properly to be considered in passing sentence.

It was held in *Moore v. Missouri*, 159 U. S., 673, that an increased severity of punishment for the second offense is not a second punishment for the first offense.

In *State v. Hamby*, 126 N. C., 1066, the case of *State v. Wilson, supra*, is affirmed, and the right of the Judge to take into consideration the past record of defendant is sustained. See also *State v. Davidson*, 124 N. C., 844.

CONCLUSION.

We conclude this brief by making the following quotation from the opinion of the Court, written by Mr. Chief Justice Fuller, in the case of *Lambert v. Barrett*, 157 U. S. 697:

"With the disposition of State questions by the appropriate State authorities, it is not the province of this Court to interfere, and there is no basis for the suggestion of any violation of the Constitution of the United States; the denial of due process of law; or deprivation of any right, privilege, or immu-

nity secured to him by the Constitution or laws of the United States."

Hallinger v. Davis, 146 U. S., 314, (36: 986).
Ex parte Kemmler, 136 U. S., 346, (34: 519).
Caldwell v. Texas, 137 U. S., 692, (34: 816).
Ex parte Converse, 137 U. S., 624, (34: 796).
McNulty v. California, 149 U. S., 645, (37: 882).

The fifth assignment of error will be made the subject of a supplemental brief.

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DEFENDANT'S

BRIEF

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IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

Brief for D. C.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

J. L. HOWARD, *alias* FRANK THOMPSON; A. L. DALY, *alias* GONEZ BONO, and H. D. HAWLEY, PLAINTIFFS IN ERROR,

versus

THE STATE OF NORTH CAROLINA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

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BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF FACTS.

On March 23, 1901, the defendants were arrested upon a warrant issued by a justice of the peace of Guilford county, North Carolina, charging them with conspiracy to defraud. Record, page 21.

The justice, having found that there was probable cause of guilt, held the defendants to bail for their appearance at the next term of the Superior Court of Guilford county, which court is one of general criminal jurisdiction.

At June Term, 1901, of said court an indictment was duly returned "a true bill" by the grand jury of said county. Record, page 59. The indictment as found contained three counts.

The defendants endeavored to quash the bill of indictment, assigning nine reasons therefor. Record, pages 62, 63, 64.

Upon the refusal of their motion, the defendants entered a plea of not guilty. There was a trial by a jury, a verdict of guilty and judgment sentencing the defendants Howard and Hawley to ten years and Daly to seven years in the State Penitentiary.

On appeal to the Supreme Court, the judgment was affirmed. Record, page 23. The defendants were then duly confined in the State Penitentiary of North Carolina.

Whereupon the defendants applied for and obtained a writ of error to the Supreme Court of the United States, and are the plaintiffs in error here.

APPELLANTS' ASSIGNMENT OF ERROR.

The appellants' assignment of error (Record, pages 51 and 53) are, briefly, as follows:

1. That the grand jury which presented the bill of indictment against them was illegally drawn.

2. That they were denied the equal protection of the laws of North Carolina by being tried on that bill of indictment.

3. That the trial court did not instruct the jury that the law presumed the petitioners to be innocent until overcome by positive evidence of guilt.

4. That the judgment was illegal, because

(a) It was more severe than usual.

(b) It was unauthorized by statute.

(c) It was cruel and unusual, as defined by the Constitution of North Carolina.

(d) It violated the Eighth Amendment to the Federal Constitution.

5. For that a conspiracy to cheat and defraud is not a criminal offense in North Carolina.

6 and 7. These are merely formal.

FIRST ASSIGNMENT OF ERROR.

The plaintiffs in error contend that the judgment of the Supreme Court of the State of North Carolina should be reversed because of informalities in the manner in which the jury was drawn for the court at which the bill of indictment was found and they tried and convicted. It will be observed that while a motion was made to quash the bill of indictment (Record, page 62), this objection was not made, and was first heard of in the replication of the petitioners to the answer of the Warden of the State Penitentiary to the writ of *habeas corpus* (Record, page 24), while the facts are stated constituting the alleged illegal method of drawing the grand jury.

These alleged irregularities cannot avail the appellants, for two reasons:

THE OBJECTION SHOULD HAVE BEEN TAKEN BEFORE PLEA TO THE INDICTMENT.

"The settled rule of a State Court that objections to the manner of selecting grand jurors on behalf of one who has been indicted by such jurors must be taken by plea in abatement, and not by motion to quash the venire and panel, is binding on

the Supreme Court of the United States on writ of error to the State Court." Torrence v. Florida, U. S. (October Term, 1902).

It is the settled rule in North Carolina that exceptions to the constitution and qualification of the grand jury must be taken before plea, or they will be declared to have been waived.

The rule is thus stated in *State v. Gardner,* 104 N. C., 739: "If the motion is made before plea, the defendant has the right in law to have the qualification or constitution of the grand jury inquired into and passed upon; but if made after plea and before the jury is empaneled, it may be granted or not, in the sound discretion of the presiding judge, but if it is not made until after the jury is sworn, the objection will be deemed to have been waived."

This case has since been approved in the following cases:

State v. Wilcox, 104 N. C., 853.
State v. Sharp, 110 N. C., 604.
State v. Fertilizer Company, 111 N. C., 658.
State v. DeGraff, 113 N. C., 688.

Avery, J., thus states the rule in Sharp's case: "The general rule is that such a plea will not be sustained, if admitted to be true, unless it show a want of some positive qualification prescribed by law; that all other objections to the competency of a grand juror must be taken, if at all, by challenge, and will not be heard after the time for challenging is passed. Thom. & Mer. on Juries, section 533; Bishop Cr. Prac., section 739; *People v. Jarrett,* 3 Wend., 314; 12 Am. & Eng. Enc., 343*a*."

The last time the question was presented to the North Carolina Supreme Court was in *State v. Parker,* 43 Southeastern Reporter, 830 (not yet officially reported), in which the Court declares:

"A special venire of twenty-five freeholders was summoned under the order of the Court, whose names were drawn from the jury box, in the presence and under the direction of the Court, by a boy who was over ten years of age, and five of the jurors so drawn were taken and served upon the jury. There does not appear to have been any challenge or objection to any

of them. So far as it does appear, they were each and all perfectly acceptable to the State and defendant. After the verdict of guilty had been returned by the jury, the defendant, through his counsel, moved in arrest of judgment upon the ground that the special venire had been drawn by a boy over ten years of age, and that five of the venire had served as jurors in the case. The motion of the defendant to arrest the judgment was properly overruled. It was too late after the verdict to present any objection to the manner of selecting the jurors for the special venire by a motion in arrest of judgment."

But the matter is settled by statute, for the Legislature in 1883 put into statutory form what had previously been the acknowledged practice in this State. The following is section 1741 of The Code:

"All exceptions to grand jurors for and on account of their disqualification shall be taken before the jury is sworn and empaneled to try the issue by motion to quash the bill of indictment, and if not so taken, the same shall be deemed to have been waived."

THE FEDERAL COURTS ADMINISTER THE SAME RULE.

The petitioners will hardly seriously contend that this statute is in contravention of the Federal Constitution, for the Federal practice is uniform with the State procedure and the State statute, for it was held, in *United States v. Gale*, 109 U. S., 65 (27: 857), that a plea to an indictment is a waiver of the mode of selecting a grand jury, even though the objection is upon the ground that the act under which the grand jury was drawn and selected is unconstitutional, *i. e.*, that it violates the provisions of the Federal Constitution.

Again, in *Agnew v. United States*, 165 U. S., 36 (41: 624), it was held that "a plea in abatement of an indictment stating that the drawing of the grand jurors tended to the defendant's injury and prejudice, without stating any grounds for such conclusion, is fatally defective"; and that "an objection to irregularities in drawing grand jurors is too late when it is made in a plea of abatement filed five days after indictment and

two weeks after the irregularities complained of began, when no reason is given for failure to make the objection sooner."

Again, in *Andrews v. Swartz*, 156 U. S., 272, petitioner alleged that he was deprived of his constitutional protection, in that in making up the grand jury which indicted him and the petit jury which tried him the sheriff had purposely excluded therefrom negroes—petitioner being a negro—and he offered to show this to the Court, which refused to hear it. The Court held that this does not entitle him to *habeas corpus;* that if it were so, the State Court had not thereby lost jurisdiction of the offense or of the accused.

THE STATUTE IS MERELY DIRECTORY.

But even if the appellants had in apt time objected to the alleged irregularities in the method of drawing the grand jury, it would not have availed them, for the Supreme Court of North Carolina holds that the provisions regulating the drawing of grand juries are not mandatory, but are merely directory.

"It has always been held that the regulation of The Code, sections 1722 and 1728, are directory only to the Board of County Commissioners, and, while they should be observed, a failure to do so does not vitiate the venire in the absence of bad faith or corruption on the part of the County Commissioners." Quotation from *State v. Perry* (Hatton), 122 N. C. R., 1020.

The opinion quotes as authority for this statement the following cases:

State v. Smarr, 121 N. C. R., 669.
State v. Stanton, 118 N. C. R., 1182.
State v. Fertilizer Company, 111 N. C., 658.
State v. Wilcox, 104 N. C., 847.
State v. Hensley, 94 N. C., 1021.
State v. Martin, 82 N. C., 672.
State v. Griffice, 74 N. C., 316.
State v. Haywood, 73 N. C., 437.

See also *State v. Potts*, 100 N. C., 460, where it appeared

that there was but one key, and boxes were improperly labelled. Chief Justice Smith said: "The ruling is correct, and the deviation from a direction merely of the act is not a material matter, as its esssential provisions for the security of the accused have been observed."

State v. Martin, 82 N. C., 672, is strikingly in point with the case at bar. There, upon a motion to quash in apt time, it appeared that the County Commissioners, after drawing certain jurors, put their names back into the box and drew others so as to secure an equality of jurors from the different townships in the county. It was held that while not in strict compliance with The Code, the act being merely directory and not mandatory, and no actual wrong had been done or intended, the challenge to the array was overruled.

In our case the names from each township were put into smaller boxes inside of the boxes prescribed by law, and certain numbers were drawn from each of the smaller boxes to secure equality among the several townships, and it does not appear that any wrong was done or intended to the petitioners. The case is clearly within the rule stated in Martin's case.

SECOND ASSIGNMENT OF ERROR.

The second assignment of error (Record, page 53) is that the Supreme Court of North Carolina did not find as a fact and hold as its judgment that the appellants were denied the equal protection of the laws of the State of North Carolina in accepting and filing the bill of indictment on which they were tried.

It is presumed that this is a mere repetition of the first assignment of error, which has already been answered. This assignment specially objects to the finding of facts by the State Courts. These cannot be reviewed either upon appeal or writ of error.

Dower v. Richards, 151 U. S., 663, 668, 669.
In re Buchanan, 158 U. S., 31.
Bartlett v. Lockwood, 160 U. S., 360.
Stanley v. Schwalby, 162 U. S., 278.
Noble v. Mitchell, 164 U. S., 373.
Israel v. Arthur, 152 U. S., 362.

It is for the State Court to determine whether or not its statutes are binding under the State Constitution, and whether one has received equal protection of the laws of the State in a regular administration of the criminal law. *Leeper v. Texas,* 139 U. S., 462; *O'Neil v. Vermont,* 144 U. S., 336.

INSUFFICIENCY OF INDICTMENT NOT A FEDERAL QUESTION.

An erroneous ruling on a defective indictment does not present a Federal question.

Bergemann v. Backer, 157 U. S., 655.
Central Land Company v. Laidley, 159 U. S., 112.
Gibson v. Mississippi, 162 U. S., 59.
In re Boardmen, 169 U. S., 44.
Remington Paper Company v. Watson, 173 U. S., 451.
Kohl v. Lehlback, 160 U. S., 293.

Due process of law does not even require an indictment where information is provided for.

McNulty v. California, 149 U. S., 645.
Talton v. Mayes, 163 U. S., 384.
Nordstron v. Washington, 164 U. S., 705.

The question as to whether or not an indictment charges a crime under the laws of a State does not present a Federal question.

Caldwell v. Texas, 137 U. S., 692.
Davis v. Texas, 139 U. S., 652.
Bergemann v. Backer, 157 U. S., 656.
O'Neil v. Vermont, 144 U. S., 323.

THIRD ASSIGNMENT OF ERROR.

The third assignment of error (Record, page 53) is that the appellants were denied equal protection of the laws of North Carolina, in that the *nisi prius* judge did not instruct the jury that they were presumed to be innocent, and that this presumption attended them until it was overcome by positive evidence of guilt.

The answer to this assignment of error is that it is untrue in fact. While the judge did not charge the jury in the very language asked, he impressed upon the jury four different times not only that there was a presumption of innocence, but that this presumption should not only be rebutted by the facts proved, but that they should satisfy the jury *beyond reasonable doubt.*

The material part of the judge's charge on this subject is as follows (Record, pages 118 and 119):

"Where the State asks a conviction of any one charged with the commission of crime, it must satisfy the jury from the evidence in the case of the guilt of the accused *beyond a reasonable doubt*, and if it fails to do so, the jury should acquit, but if the evidence so satisfies, then the jury should convict. This rule of law applies to the case at bar, and if upon consideration of the evidence offered by the State, it satisfies you of the guilt of the defendants, or any two of them, *beyond a reasonable doubt,* then your verdict should be 'guilty' as to such, naming them; otherwise, if you are not so satisfied, that is to say, your verdict should be 'not guilty.'

"Now, what is a reasonable doubt? While there is no set formula that is used defining it, it may be defined for the purpose of this charge as being such a doubt as would appeal to and be supported by the reasoning of a man of ordinary intelligence, or, as has perhaps been more aptly expressed by our Supreme Court, as meaning that after a consideration of all the evidence with all the light derived from the argument of counsel and the instructions of the Court, the jury ought not to convict unless they find that their minds have been involuntarily led to the conviction that the prisoner was 'guilty,' as charged.

"Now, upon the consideration of the evidence, the argument of counsel and the charge of the Court in this case, say whether or not you are satisfied *beyond reasonable doubt* of the guilt of the defendants or any two of them, and if so, your verdict as to such should be guilty, naming them; otherwise, if not so satisfied, that is, 'not guilty' as to any or all of the defendants, as you may find. * * *

* * * "Take all the facts and circumstances disclosed by the evidence, and if they satisfy you *beyond a reasonable doubt*

of the existence of the conspiracy charged against the defendants or any two of them, then the act of any one of them is the act of all and each of the conspirators."

But even if this were error, no Federal question is presented by it.

FOURTH ASSIGNMENT OF ERROR.

This assignment of error alleges that the judgment and sentence imposed upon the defendants is void for four reasons:

(a) The first reason assigned is that in fact the sentence is more severe than that which has ever before been imposed.

There is no fact found in the record to support this contention, and a Federal question cannot be thus presented. *Walker v. Vellaraso*, 6 Wall., 128; *Dower v. Richards*, 151 U. S., 663.

(b) It is next contended that the sentence was unauthorized by the statutes of North Carolina. By the Public Laws of 1891, chapter 205, it was enacted as follows:

"A felony is a crime which is or may be punishable by either death or imprisonment in the State's Prison. Any other crime is a misdemeanor."

By section 1097 of The Code of North Carolina (1883) it is enacted that—

"Offenses made misdemeanors by statute, where a specific punishment is not prescribed, shall be punished as misdemeanors at common law; but if the offense be infamous or done in secrecy and malice or with deceit and intent to defraud, the offender shall be punished by imprisonment in the county jail or penitentiary not less than four months nor more than ten years, and be fined."

The Supreme Court of North Carolina, in the case of *State v. Mallett*, 125 N. C., 718, which was an indictment for a conspiracy to cheat and defraud, decided that under these two statutes one convicted of a conspiracy to defraud could be punished by imprisonment in the State Prison or Penitentiary for a period not exceeding ten years. Mallett's case was taken by writ of error to the Supreme Court of the United States. But this point was not even presented there.

The Supreme Court of North Carolina, in its opinion in the case at bar, says: "The defendants except to the sentence imposed of imprisonment in the penitentiary, but concede that this Court has ruled otherwise in *State v. Mallett,* 125 N. C., 718, which we reaffirm."

This is simply a case of a State Court determining the meaning of a State statute and Constitution, and contains nothing that is obviously violative of the fundamental principles.

Leeper v. Texas, 139 U. S., 462.
O'Neil v. Vermont, 144 U. S., 336.
McNulty v. California, 149 U. S., 645.
Lambert v. Barrett, 157 U. S., 697.
Raezel v. Kirk, 172 U. S., 646.
Bergemann v. Backer, 157 U. S., 655.
Kohl v. Lehlback, 160 U. S., 296.

(c) It is further contended that the judgment is void because the punishment is cruel and unusual as defined by the Constitution of North Carolina.

It was expressly held in *O'Neil v. Vermont,* 144 U. S., 323, that the question as to whether or not the punishment of a criminal is cruel or unusual under the Constitution and laws of a State is not a Federal one.

(d) It is further contended that the punishment is violative of the Eighth Amendment of the Federal Constitution.

The Eighth Amendment is inapplicable to the States, and applies only to Federal action.

O'Neil v. Vermont, 144 U. S., 323.
Barron v. Baltimore, 7 Pet., 243.
Peryear v. Massachusetts, 5 Wall., 475.
Ex parte Kemmler, 136 U. S., 436.
Davis v. Texas, 139 U. S., 651.

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FIFTH ASSIGNMENT OF ERROR.

The fifth assignment of error is that a conspiracy to cheat and defraud is not a criminal offense in North Carolina.

Decision of State Court as to Existence of Law Conclusive.

The petitioners contend that there is no statute or provision of the common law which makes their conduct indictable in North Carolina, and that there being no criminal offense, they are held without due process of law.

It is not contended that if such a law exists it contravenes any provision of the Federal Constitution. The Legislature clearly has the right to pass such a law. The only question is, does such a law exist?

In the case of *Duncan v. McCall,* 139 U. S., 449, the petitioner contended that there was no act in the State of Texas making the offense of which he was charged indictable, and that for that reason "he was deprived of his liberty without due process of law and denied the equal protection of the laws." He contended that the statute was void because it had not been enacted in accordance with the requirements of the Constitution of Texas.

The following is the head-note of the decision:

"2. The decision of the State Courts on the question as to what are the laws of a State is binding upon those of the United States."

"3. Whether certain statutes of a State have or have not binding force, it is for the State to determine, and that determination in itself involves no infraction of the Constitution of the United States and raises no Federal question giving the Courts of the United States jurisdiction."

In the case of *Leeper v. Texas,* 139 U. S., 462, Mr. Chief Justice Fuller, in speaking for the Court, said:

"It must be regarded as settled that a petition for a writ of error forms no part of the record upon which action here is taken. * * *

"That whether statutes of a Legislature of a State have been

duly enacted in accordance with the requirements of the Constitution of such State is not a Federal question, and the decision of State Courts as to what are the laws of the State is binding upon the Courts of the United States. *South Ottawa v. Perkins*, 94 U. S., 260, 268 (24: 154, 157); *Post v. Kendall County Sup'rs*, 105 U. S., 667 (26: 1204); *Norton v. Shelby County*, 118 U. S., 425, 440 (30: 178, 185); *Atlantic & G. R. Co. v. Georgia*, 98 U. S., 359, 366 (25: 185, 188); *Baldwin v. Kansas*, 129 U. S., 52, 57 (32: 640, 642). That by the Fourteenth Amendment the powers of States in dealing with crime within their borders are not limited, except that no State can deprive particular persons or classes of persons of equal and impartial justice under the law; that law in its regular course of administration through courts of justice is due process, and when secured by the law of the State the constitutional requirement is satisfied."

The Supreme Court of North Carolina, in *State v. Brady*, 107 N. C., 822, decided that an indictment of the same character as that upon which petitioners were tried and convicted was good, and charged an offense against the criminal laws of North Carolina, citing other North Carolina authorities to sustain the position of the Court. Brady's case has been subsequently cited with approval nine times. As early as December Term, 1827, the Supreme Court of North Carolina had declared conspiracy to cheat and defraud to be a crime in this State. *State v. Younger*, 12 N. C. R., 357.

In the case of *Caldwell v. Texas*, 137 U. S., 691, the writ of error had been granted to the Court of Appeals of Texas upon the ground "that the indictment is fatally and fundamentally defective and void under the Constitution of the State and does not, either in form or substance, set out a valid charge of murder or any other offense known to the criminal law of the State, and is not due process of law under the Fourteenth Amendment of the Constitution of the United States." The writ of error was dismissed, on motion. Mr. Chief Justice Fuller, delivering the opinion, said:

"By the Fourteenth Amendment the powers of the States in dealing with crime within their borders are not limited, but no

State can deprive particular persons or classes of persons of equal and impartial justice under the law. Law, in its regular course of administration through courts of justice, is due process, and when secured by the law of the State, the constitutional requirement is satisfied. 2 Kent. Com., 13. And due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice. *Bank v. Oakley*, 17 U. S., 244. The powers of the State must be exercised within the limits of those principles, and its exertion cannot be sustained when special, partial and arbitrary. *Hurtado v. California*, 110 U. S., 516. No question of repugnancy to the Federal Constitution can be fairly said to arise when the enquiry of the State Courts is directed to the sufficiency of an indictment in the ordinary administration of the criminal law, and the statutes authorizing the form of indictment pursued are not obviously violative of the fundamental principles above adverted to." * * *

See also authorities cited under second assignment of error.

OTHER QUESTIONS.

The appellants present several other objections, either in their petition for a writ of *habeas corpus* and writ of error, or in their brief.

One relates to the question of whether they should be imprisoned in the penitentiary, or sentenced to work on the highways of Guilford county. This question was first presented in the rejoinder to the answer to the writ of *habeas corpus*.

The statute in direct terms gives the Judge discretion as to the place of imprisonment.

In the case of *Davis v. Burke*, 179 U. S., 404, it was decided that the place of execution did not present a Federal question.

The validity of a sentence under a State law will not be reviewed by the Supreme Court. *Storti v. Massachusetts*, 183 U. S., 142.

The appellants object that there was a misjoiner in the original bill of indictment which contained three counts. At the

close of the evidence, two of them were *nol prossed* and used as bills of particulars upon the first count.

It was held that a Federal question was not presented by the suggestion of a misjoinder of counts in the indictment in the case of *McDonald v. Massachusetts*, 180 U. S., 313.

The instruction that the jury might find the defendant guilty if satisfied that he had killed and murdered, "in the manner and form charged in either of the counts," though one was bad, does not violate the Constitution of the United States so as to give jurisdiction to the Supreme Court. *Brooks v. Missouri*, 124 U. S., 396.

The appellants further contend that the Judge in imposing the sentence increased the term to imprisonment because of facts pertaining to the previous history of the defendants which he himself heard.

It was held in *State v. Wilson*, 121 N. C., 654, that in a charge for conspiracy to seduce a woman the previous character of the defendant ought justly and properly to be considered in passing sentence.

It was held in *Moore v. Missouri*, 159 U. S., 673, that an increased severity of punishment for the second offense is not a second punishment for the first offense.

In *State v. Hamby*, 126 N. C., 1066, the case of *State v. Wilson, supra*, is affirmed, and the right of the Judge to take into consideration the past record of defendant is sustained. See also *State v. Davidson*, 124 N. C., 844.

CONCLUSION.

We conclude this brief by making the following quotation from the opinion of the Court, written by Mr. Chief Justice Fuller, in the case of *Lambert v. Barrett*, 157 U. S. 697:

"With the disposition of State questions by the appropriate State authorities, it is not the province of this Court to interfere, and there is no basis for the suggestion of any violation of the Constitution of the United States; the denial of due process of law; or deprivation of any right, privilege, or immu-

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nity secured to him by the Constitution or laws of the United States."

Hallinger v. Davis, 146 U. S., 314, (36: 986).
Ex parte Kemmler, 136 U. S., 346, (34: 519).
Caldwell v. Texas, 137 U. S., 692, (34: 816).
Ex parte Converse, 137 U. S., 624, (34: 796).
McNulty v. California, 149 U. S., 645, (37: 882).

The fifth assignment of error will be made the subject of a supplemental brief.

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